Excerpt from

# Innocence Is Irrelevant in the Age of the Plea Bargain

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This is the age of the plea bargain. Most people adjudicated in the criminal-justice system today waive the right to a trial and the host of protections that go along with one, including the right to appeal. Instead, they plead guilty. The vast majority of felony convictions are now the result of plea bargains—some 94 percent at the state level, and some 97 percent at the federal level. Estimates for misdemeanor convictions run even higher. These are astonishing statistics, and they reveal a stark new truth about the American criminal-justice system: Very few cases go to trial. Supreme Court Justice Anthony Kennedy acknowledged this reality in 2012, writing for the majority in *Missouri v. Frye*, a

case that helped establish the right to competent counsel for defendants who are offered a plea bargain. Quoting a law-review article, Kennedy wrote, “ ‘Horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.’ ”

Ideally, plea bargains work like this: Defendants for whom there is clear evidence of guilt accept responsibility for their actions; in exchange, they get leniency. A time-consuming and costly trial is avoided, and everybody benefits. But in recent decades, American legislators have criminalized so many behaviors that police are arresting millions of people annually—almost 11 million in 2015, the most recent year for which figures are available. Taking to trial even a significant proportion of those who are charged would grind proceedings to a halt. According to Stephanos Bibas, a professor of law and criminology at the University of Pennsylvania Law School, the criminal-justice system has become a “capacious, onerous machinery that sweeps everyone in,” and plea bargains, with their swift finality, are what keep that machinery running smoothly.

Because of plea bargains, the system can quickly handle the criminal cases of millions of Americans each year, involving everything from petty violations to violent crimes. But plea bargains make it easy for prosecutors to convict defendants who may not be guilty, who don't present a danger to society, or whose "crime" may primarily be a matter of suffering from poverty, mental illness, or addiction. And plea bargains are intrinsically tied up with race, of course, especially in our era of mass incarceration.

As prosecutors have accumulated power in recent decades, judges and public defenders have lost it. To induce defendants to plead, prosecutors often threaten "the trial penalty": They make it known that defendants will face more-serious charges and harsher sentences if they take their case to court and are convicted. About 80 percent of defendants are eligible for court- appointed attorneys, including overworked public defenders who don't have the time or resources to even consider bringing more than a tiny fraction of these cases to trial. The result, one frustrated Missouri public defender complained a decade ago, is a style of defense that is nothing more than "meet 'em and greet 'em and plead 'em."

According to the Prison Policy Initiative, 630,000 people are in jail on any given day, and 443,000 of

them—70 percent—are in pretrial detention. Many of these defendants are facing minor charges that would not mandate further incarceration, but they lack the resources to make bail and secure their freedom. Some therefore feel compelled to take whatever deal the prosecutor offers, even if they are innocent.

Writing in 2016 in the *William & Mary Law Review*, Donald Dripps, a professor at the University of San Diego School of Law, illustrated the capricious and coercive nature of plea bargains. Dripps cited the case of Terrance Graham, a black 16-year-old who, in 2003, attempted to rob a restaurant with some friends. The prosecutor charged Graham as an adult, and he faced a life sentence without the possibility of parole at trial. The prosecutor offered Graham a great deal in exchange for a guilty plea: one year in jail and two more years of probation. Graham took the deal. But he was later accused of participating in another robbery and violated his probation—at which point the judge imposed the life sentence.

What's startling about this case, Dripps noted, is that Graham faced two radically different punishments for the same crime: either be put away for life or spend minimal time behind bars in exchange for a guilty

plea. In 2010, the Supreme Court ruled, in *Graham v. Florida*, that the punishment Graham faced at trial was so cruel and unusual as to be unconstitutional. The Court found that a juvenile who did not commit homicide cannot face life without parole.

Thanks in part to plea bargains, millions of Americans have a criminal record; in 2011, the National Employment Law Project estimated that figure at 65 million. It is a mark that can carry lifetime consequences for education, employment, and housing. Having a record, even for a violation that is trivial or specious, means a person can face tougher charges and punishment if he or she again encounters the criminal-justice system. Plea bargaining has become so coercive that many innocent people feel they have no option but to plead guilty. “Our system makes it a rational choice to plead guilty to something you didn’t do,” Maddy deLone, the executive director of the Innocence Project, told me. The result, according to the late Harvard law professor William J. Stuntz, who wrote extensively about the history of plea bargains in *The Collapse of American Criminal Justice* (2011), is a system that has become “the harshest in the history of democratic government.”

To learn more about how plea bargaining works in

America today, I went to Nashville, where Shanta Sweatt entered her plea. A blue county in a red state, Davidson County, which includes Nashville, has a population of about 680,000. According to District Attorney Glenn Funk, Nashville–Davidson County handles about 100,000 criminal cases a year, 70 percent of which are misdemeanors, 30 percent felonies. Last year, attorneys in the public defender's office dealt with 20,000 misdemeanors and 4,900 felony cases. Of all the defendants processed in Nashville–Davidson County last year, only 86 had their cases resolved at trial.

During my week in Nashville, I attended hearings at the

courthouse on a full range of cases. I sat in on the plea discussions between an assistant district attorney and two public defenders. I observed a public defender in conversation with jailed defendants facing felony charges. I saw justice meted out courtroom by courtroom, often determined in part by the attitude, even the mood, of the prosecutor. My experience may not have been representative, but over the course of five days, I saw few defendants who had harmed someone else. Those who were facing felony charges had been arrested for drug offenses; some were clearly

addicts with mental-health problems.

I started with the misdemeanor-citation docket, which covers the lowest-level offenses. The defendants on the courtroom benches were white, black, and Latino. Sartorial guidelines were posted on the doors: no “see-through blouses,” no “exposed underwear,” no “sagging pants.” Ember Eyster, Shanta Sweatt’s attorney, was at the courthouse, but very few of the defendants in court that day had requested the services of a public defender or were accompanied by a lawyer.

Misdemeanors are lesser offenses than felonies and are supposed to result in limited penalties. In Tennessee, Class A misdemeanors are sometimes referred to as 1129s: convictions that carry a maximum sentence of 11 months and 29 days. Many people convicted of misdemeanors are given probation or a suspended sentence or simply “time served”—that is, the amount of time they spent waiting in jail for their case to be heard because they couldn’t make bond. The most-minor offenses can result in being required to take a class or do community service. Getting put through the system often also means accruing fines, fees, and court costs, which in a single case can run to more than $1,000. The punishments are not designed to be

severe, or to create long-lasting consequences. But for many people they do.

Millions of people each year are now processed for misdemeanors. In a 2009 report titled “Minor Crimes, Massive Waste,” the National Association of Criminal Defense Lawyers described a system characterized by “the ardent enforcement of crimes that were once simply deemed undesirable behavior and punished by societal means or a civil infraction punishable by a fine.”

In Nashville, I was struck by how many people were in court because they had been picked up for driving with a suspended license. It’s a common practice, I learned, for states to suspend the licenses of people who have failed to pay court costs, traffic fines, or child support. In 2011, for example, Tennessee passed a law requiring the suspension of licenses for nonpayment of certain financial obligations. Both Glenn Funk, who must enforce this law, and Dawn Deaner, the head of the public defender’s office, agree that it’s absurd, in part because the scheme is almost perfectly designed to prevent the outcome it seeks. If people stop driving when their licenses are suspended, they may no longer be able to reliably get to work, which means they risk losing their jobs and going deeper into debt. As a result, many

people whose licenses have been suspended drive anyway, putting themselves in constant jeopardy of racking up misdemeanor convictions. It is common for defendants charged with such minor infractions to represent themselves, even if they don't understand the consequences of pleading guilty, and even if there might be some mitigating circumstances that an attorney could argue on their behalf. Plead guilty to enough suspended- license misdemeanors, and a subsequent charge can be a felony.

Funk, who was elected in 2014, has stopped routinely jailing defendants arrested for driving with a suspended license. "Most of the time, driver's licenses are revoked because of poverty," he told me. "I want people to have a license. It gives them ownership in society." Deaner told me that about two-thirds of the people listed on the citation docket are on there because of a driver's-license violation. And once their names are on the docket, the system strongly encourages them to plead guilty. "It's a hamster wheel of bureaucracy," she said, "that does no one any good."

Plea bargains didn't exist in colonial America. Law books, lawyers, and prosecutors were rare. Most judges had little or no legal training, and victims ran

their own cases (with the self- evident exception of homicides). Trials were brief, and people generally knew one another. By the 19th century, however, our modern criminal-justice system was coming into its own: Professional prosecutors emerged, more defendants hired lawyers to represent them, and the courts developed more- formal rules for evidence. Trials went from taking minutes or hours to lasting days. Calendars became clogged, which gave judges an incentive to start accepting pleas. “Suddenly, everybody operating inside the system is better off if you have these pleas,” Penn’s Stephanos Bibas told me.

The advantages of plea bargains became even clearer in the latter part of the 20th century, after the Supreme Court, under Chief Justice Earl Warren, issued a series of decisions, between 1953 and 1969, that established robust protections for criminal defendants. These included the landmark *Gideon v. Wainwright* and *Miranda v. Arizona* decisions, the former of which guaranteed the Sixth Amendment right to counsel in felony cases (since expanded to some misdemeanor cases), and the latter of which required that police inform those in their custody of the right to counsel and against self-incrimination. The Court’s rulings had the inevitable effect of making trials lengthier and more burdensome, so

prosecutors began turning more frequently to plea bargains. Before the 1960s, according to William J. Stuntz, between one-fourth and one-third of state felony charges led to a trial. Today the figure is one-twentieth.

The legal system provides few rules and protections for those who take a deal. In what has been described as one of the Court's earliest plea-bargain decisions, *Brady v. United States* (1970), the justices found that guilty pleas were acceptable as long as certain conditions were met, among them the following: Defendants had to have competent counsel; they had to face no threats, misrepresentations, or improper promises; and they had to be able to make their plea "intelligently."

This seemed eminently fair. But crime had already started to increase sharply. The rise provoked a get-tough response from police, prosecutors, and legislators. As the rate of violent crime continued to accelerate, fueled in part by the crack epidemic that started in the '80s, the response got even tougher. By the 1990s, the U.S. had entered what Donald Dripps calls "a steroid era in criminal justice," which continued even though violent crime peaked by 1992 and began its now-historic decline. In the late 20th century, legislators passed mandatory-

minimum-sentence and “three strikes” laws, which gave prosecutors an effective bludgeon they could use to induce plea bargains. (Some “three strikes” laws result in life imprisonment for a third felony; hundreds of people in California received this punishment for shoplifting. California reformed its three-strikes legislation in 2012 to impose such punishments only for serious or violent felonies.)

The growth of the system took on a life of its own. “No one sets out to create bloated criminal codes,” I was told by David Carroll, the executive director of the Sixth Amendment Center, which protects the right to counsel. “But once they exist, vast resources are spent to justify them.” In response to the crime wave, the United States significantly expanded police forces to catch criminals, prosecutor’s offices to charge them, and the correctional system to incarcerate them. Legislators have added so many acts to criminal codes that in 2013, Neil Gorsuch—now on the Supreme Court, but then an appellate judge—publicly raised concerns. In a speech sponsored by the Federalist Society, he asked, “What happens to individual freedom and equality—and to our very conception of law itself—when the criminal code comes to cover so many facets of daily life that prosecutors can almost choose their targets

with impunity?”

One morning in Nashville, I sat at the prosecutor’s table with Emily Todoran, an assistant district attorney, and Ryann Casey and Megan Geer, two young public defenders. (Geer has since left for a private criminal-defense firm.) Before us was a two-inch stack of paperwork that included police reports on everyone who had been picked up the night before, for a variety of misdemeanor violations. None of those arrested had made bond (“Basically, it’s all homeless offenses,” Geer said), so everyone whose case was being assessed was waiting in jail.

Police officers have wide discretion in deciding whether a person is breaking the law, and they sometimes arrest people for such offenses as sleeping in public and sitting too long on a bench. One case involved a woman whose crime seemed to have been, in the words of the officer who filed the report, “walking down the road around 1:30 a.m.” with “no legitimate reason.” Casey told me before this meeting that she hoped to get all such cases dismissed. “Walking down the street!” she said. “Imagine if it was you.”

Ember Eyster told me it’s sometimes possible to get misdemeanor cases dismissed with a bit of investigation. Maybe a trespassing charge doesn’t

hold up, for example, because the property owner hadn't posted a no trespassing sign. But this takes time, and clients who can't make bond have to sit in jail until the job is done. It's a choice few are willing to make for the small chance of avoiding a conviction. Many clients tell Eyster as soon as they meet her that they want to plead guilty and get time served.

The choice makes sense under the circumstances. But anybody who makes it is incurring a debt to society that's hard, sometimes impossible, to repay. Those with a conviction in the United States can be denied public housing, professional licenses, and student loans. Many employers ask whether job applicants have been convicted of a crime, and in our zero-tolerance, zero-risk society, it's rational to avoid those who have.

People with a misdemeanor conviction who get picked up for another minor offense are more likely to face subsequent conviction—and that, according to Issa Kohler-Hausmann, an associate professor of law and sociology at Yale, is part of a deliberate strategy. Kohler-Hausmann made this case in a provocative 2014 *Stanford Law Review* article, "Managerial Justice and Mass Misdemeanors," about the rise of misdemeanor arrests in New York

City, which occurred even as felony arrests fell. Authorities, she argued, tend to pay “little attention” to assessing “guilt in individual cases.” Instead, they use a policy of “mass misdemeanors” to manage people who live in “neighborhoods with high crime rates and high minority populations.” These defendants, she wrote, are moved through the criminal-justice system with little opportunity to make a case for themselves. They are simply being processed, and the “mode of processing cases” is plea bargaining. (This year, New York City settled a federal class-action lawsuit against it for issuing hundreds of thousands of unjustified criminal summonses.)

Sitting at the prosecutor’s table that morning, I watched Todoran, Casey, and Geer read from the police reports and make deals. Such a ritual takes place, in one form or another, in the courts of each of the country’s more than 3,000 counties, which make up what the Fordham University law professor John Pfaff has described in his book *Locked In* as “a vast patchwork of systems that vary in almost every conceivable way.” We know little about what happens in these negotiations. Trials leave copious records, but many plea bargains leave little written trace. Instead, they are sometimes worked out in hurried hallway conversations—or, as I witnessed, in

brief courtroom conferences.

*casey:* He was lying across a sidewalk over a vent, because it was cold.
*todoran:* Dismiss it. You've got to sleep somewhere.
*casey*: This one is for standing in front of a liquor store.
*todoran*: Dismiss. For so many of these things, a few hours in jail is punishment enough.

*geer*: This defendant was found in a car with marijuana and 0.7 grams of crack.
*todoran*: I guess we'll do time served.
*casey*: This man was at Tiger Mart. He was warned to leave earlier, and then came back.

*todoran*: Thirty days suspended and stay away from Tiger Mart. casey: This case, an officer heard him yelling and cussing and arrested him by the rescue mission.
todoran: Dismiss.

*geer*: This is my favorite—the woman who was walking down the road.
*todoran*: Dismiss.

For many of the cases, Todoran was making her decision in less than a minute. I felt I was watching justice dispensed at the pace of speed dating.

Critics on the left and the right are coming to agree that our criminal-justice system, now so reliant on plea bargaining, is broken. Among them is Jed S. Rakoff, a United States district judge for the Southern District of New York, who wrote about the abuses of plea bargains in 2014, in *The New York Review of Books. "*A criminal justice system that is secret and government- dictated," he wrote, "ultimately invites abuse and even tyranny." Some critics even argue that the practice should be abolished. That's what Tim Lynch, the former director of the Project on Criminal Justice at the libertarian Cato Institute, believes. The Framers adopted trials for a reason, he has argued, and replacing them with plea bargains—for convenience, no less—is unconstitutional.

But plea bargains aren't going away, so reformers have practical suggestions for improving them. Bibas wants a "consumer- protection model." Shoppers, he told me, have more safeguards when making a credit-card purchase than defendants do when pleading guilty. He wants pleas to clearly explain several things: exactly what defendants are pleading to, what obligations (classes, probation) defendants are incurring, what the consequences of their failing to follow through would be, and what potential effects a guilty plea could have on their

lives. He has also suggested a “cooling off” period before a defendant takes a plea in serious cases. Stuntz suggested giving those who plead guilty the same protections that are offered in the military system of justice. Before accepting a plea, military judges conduct inquiries to ensure that pleas were not made under duress, and that the facts support them. This, Stuntz argued, would shift some power from prosecutors back to judges and make pleas more legitimate, which in turn would produce “a large social gain.”